



## United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Kansas Ecological Services Office  
2609 Anderson Avenue  
Manhattan, Kansas 66502-2801

September 10, 2007

Joshua Marx, Project Manager  
Regulatory Branch  
Kansas City District, Corps of Engineers  
700 Federal Building  
601 East 12th Street  
Kansas City, Missouri 64106-2896

RE: CENWK-CO-RW (2006-1014)

FWS Tracking # 2007-B-0760

Dear Mr. Marx:

This letter is in response to your request for comments on the proposal by the BNSF Railway Company to construct the Gardner Intermodal Facility (Gardner IMF) including associated track improvements near Gardner, Kansas on an approximate 490-acre site. The proposed project would result in the relocation of approximately 9,509 linear feet of a relatively permanent unnamed tributary to Big Bull Creek and approximately 6,606 linear feet of ephemeral and intermittent tributaries to Big Bull Creek. General grading would also impact and fill approximately 4.61 acres of wetlands (3.12 acres of emergent wetlands, 1.18 acres of forested wetlands, and 0.31 acres of scrub shrub wetlands) and approximately 16.65 acres of open water (agricultural ponds). The proposed 5.5 mile track relocation would result in minor impacts associated with track crossings of 13 linear waters of the United States. The applicant is proposing to mitigate impacts to waters of the U.S. onsite in a conservation corridor that would consist of the rerouted relatively permanent stream within an approximate 300 foot riparian buffer consisting of native plantings. The project is located in Sections 26, 27, 33, and 34, Township 14 south, Range 22 east, and in Sections 5, 6, and 7, Township 15 south, Range 22 east, Johnson County, Kansas.

We have reviewed the permit application pursuant to our authorities under the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*); section 404(b) of the Clean Water Act (33 U.S.C. 1344); the Migratory Bird Treaty Act of 1918 (MBTA), as amended (16 U.S.C. 703 *et seq.*); the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*); and executive orders 11990 (wetland protection) and 11988 (floodplain management).

We recommend that the mitigation for stream impacts be evaluated using the "State of Missouri

Stream Mitigation Method" (February 2007 version), which the Corps of Engineers, Kansas City District is using as an interim document for Kansas.

The new channel should not receive any mitigation credit unless it has been designed and constructed utilizing natural channel design principals. All stream crossings should be constructed so as not to impede aquatic organism passage. Open bottom structures that span at least the bankfull width are preferred. However, if culverts with bottoms are used they should be sized to accommodate at least bankfull width and buried a minimum of 12 inches with natural stream substrate covering the bottom. We have been told that BNSF is working with Bryan Simmons, KDWP, on the design of the new channel. We have confidence in Mr. Simmons abilities and would defer to his recommendations on the design of the stream channel. If this information is incorrect, we request the opportunity to review the channel design.

We are still concerned with the placement of the stream mitigation area/conservation corridor between track lines and close to the future non-BNSF warehousing area. This placement will isolate the conservation area from nearby habitats. Disturbance from noise and human activity may further reduce wildlife use of the area. Wildlife mortality may be substantial due to train and vehicle collisions as wildlife tries to access this area. This region appears to be rapidly urbanizing which will reduce the amount of suitable habitat for wildlife. Areas such as this will become more important for the survival of wildlife. Wildlife crossings could help to mitigate some adverse placement factors by linking habitat and creating safe access which would help prevent wildlife mortality. Properly constructed road/stream crossings can serve as wildlife crossings for some species. We encourage the applicant to include wildlife crossings in their plans and to take into account all wildlife including reptiles (snakes, turtles, lizards) and amphibians (salamanders, frogs) as well as mammals (deer, coyotes, raccoons, bobcats, etc.). We are willing to assist the applicant in this matter. In addition, there is good information concerning wildlife/road crossings at:

<http://www.fhwa.dot.gov/environment/wildlifeprotection/index.cfm>,

<http://www.wildlifeandroads.org/>, and

<http://www.fhwa.dot.gov/environment/wildlifecrossings/intro.htm>

We are concerned that there is no mention of mitigation for wetland impacts in the Public Notice. In accordance with the Fish and Wildlife Service, Region 6 Wetland Mitigation Guidelines, the recommended minimum ratio for ephemeral wetlands is 1.5:1 while for scrub/shrub and forested wetlands it is 2:1. Higher ratios than a simple 1:1 replacement are recommended to ensure full replacement of functions in light of documented high failure rates of created and restored wetlands and to account for the values lost through time until the replacement habitat is fully functioning. We strongly recommend that all wetland impacts are properly mitigated. We are not especially concerned about mitigation for the open-water agricultural ponds. In our opinion, these were either pit ponds dug out in upland areas or were created impoundments on streams. In case of the latter, we would prefer that stream habitat be restored rather than perpetuating the impacts to stream habitat which would occur if additional impoundment were created.

We request the opportunity to review and comment on the complete mitigation plan and monitoring reports. The complete mitigation plan should include planting and seeding lists (to

include both common and scientific names), a monitoring plan, success criteria, and contingency plans in the event that the success criteria are not achieved, and a plan to deal with invasive species. In addition, the applicant should be required to identify a secure source of funding to carry out contingency plans and to provide for long-term maintenance of the mitigation area. We recommend that only native plants endemic to an area within 100 miles of the project site be used to preserve local genotypes.

Invasive species have been identified as a major factor in the decline of native flora and fauna and impact aquatic resources. Invasive species of particular concern in Kansas include the zebra mussel (*Dreissena polymorpha*), Eurasian watermilfoil (*Myriophyllum spicatum*), purple loosestrife (*Lythrum salicaria*), Johnson grass (*Sorghum halepense*), sericea lespedeza (*Lespedeza cuneata*), salt cedar (*Tamarix spp.*), and reed canary grass (*Phalaris arundinacea*). Additional information on aquatic invasive species in Kansas can be found on KDWP's website [http://www.kdwp.state.ks.us/news/fishing/aquatic\\_nuisance\\_species](http://www.kdwp.state.ks.us/news/fishing/aquatic_nuisance_species). Executive order 13112 Section 2 (3) directs Federal agencies to not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere and to ensure that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions. Proactive measure to prevent the inadvertent spread of exotic and invasive species would appear to satisfy this directive. Therefore we recommend the implementation of the following BMP as a permit condition.

All equipment brought on site will be thoroughly washed to remove dirt, seeds, and plant parts. Any equipment that has been in any body of water within the past 30 days will be thoroughly cleaned with hot water greater 140° F (typically the temperature found at commercial car washes) and dried for a minimum of five days before being used at this project site. In addition, before transporting equipment from the project site all visible mud, plants and fish/animals will be removed, all water will be eliminated, and the equipment will be thoroughly cleaned. Anything that came in contact with water will be cleaned and dried following the above procedure.

The Migratory Bird Treaty Act prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. Takings could result from projects in prairies, wetlands, stream and woodland habitats, and those that occur on bridges and other structures if swallow or phoebe nests are present. While the provisions of MBTA are applicable year-round, most migratory bird nesting activity in Kansas occurs during the period of April 1 to July 15. However, some migratory birds are known to nest earlier than this (e.g., hawks and owls) and some later (e.g., goldfinches). If the proposed project appears likely to result in the take of migratory birds, I recommend a field survey during the nesting season of the affected habitats and structures to determine the presence of active nests. Our office should be contacted immediately for further guidance if a field survey identifies the existence of one or more active bird nests that you believe cannot be avoided temporally or spatially by the planned activities.

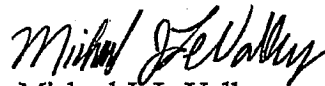
While the MBTA has no provision for allowing unauthorized take, the USFWS realizes that some birds may be killed during project construction and implementation even if all reasonable measures to protect them are used. The USFWS Office of Law Enforcement carries out its

mission to protect migratory birds through investigations and enforcement; as well as by fostering relationships with individuals, companies, and industries that have taken effective steps to minimize their impacts on migratory birds, and by encouraging others to enact such programs. It is not possible to absolve individuals, companies, or agencies from liability even if they implement avian mortality avoidance or similar conservation measures. However, the Office of Law Enforcement focuses its resources on investigating and prosecuting individuals and companies that take migratory birds without regard for their actions or without following recommendations to avoid take.

We recommend that the permit be held in abeyance pending the review of the complete mitigation plan by the resource agencies and the approval of the complete mitigation plan. We request the opportunity to review and comment on the mitigation plan.

Thank you for the opportunity to comment on this project. If you have any questions, please contact me or Susan Blackford, of my staff, at (785) 539-3474.

Sincerely,



Michael J. LeValley  
Field Supervisor

cc: EPA, Kansas City, KS (Wetland Protection Section)  
KDWP, Pratt, KS (Environmental Services)  
KDHE, Topeka, KS (Bureau of Water)

MJL/shb